UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/844
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 844

Case No. 951: SIKKA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Primla Sikka, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 30 November 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 25 October 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"[to produce certain documents and]:

...

(c) To adjudge and declare that administrative decisions by the ITC [International Trade Centre] Administration and the harassment due to personal prejudice of ITC supervisors have caused the Applicant severe health damage, high medical costs and prejudice to her career, as well as severe and prolonged financial, mental and moral stress;

(d) To adjudge and declare that unethical conduct, hostile treatment and misdiagnosing by one medical doctor of the UN Joint Medical Service (JMS)have contributed to the Applicant's health problems, additional medical costs and prejudice to her career, as well as severe mental and moral stress;

(e) To adjudge and declare that the more than five-year delay between the Applicant's appeal to the Joint Appeals Board (8 February 1991) and the Secretary-General's decision taken on the basis of the report of the Joint Appeals Board (26 June 1996), amounts to a denial of justice by the UN;

(f) To order payment of $100,000 as compensation for the prejudice to the Applicant's career and for the physical and moral damage caused by the ITC's mismanagement and harassment by ITC supervisors, as well as by the unethical conduct by a JMS medical doctor, and its moral and financial consequences on the Applicant's professional career and expectations, and as compensation for the five year delay in obtaining a hearing by the Joint Appeals Board;

(g) To order the promotion of the Applicant to grade G.6 retroactively to 1 January 1982 until 31 December 1989, in substitution of the special post allowance granted as from 1 November 1982;

(h) To order payment of salary for 82 1/2 days of annual leave abusively deducted in lieu of sick leave in the period April 1986 to April 1988;

(i) To order that the Performance Evaluation Reports for the period 1 January 1985 to 16 December 1986 be declared null and void;

(j) To order reimbursement of all legal costs incurred in relation [to] the present complaint."

Whereas the Respondent filed his answer on 29 September 1997;

Whereas, on 21 October 1997, the Applicant filed written observations;

Whereas, on 11 November 1997, the Tribunal requested the Respondent to provide it with certain information, which the Respondent did, on 13 and 14 November 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the International Trade Centre (ITC) on 16 June 1975, as a Typist, at the G-2 level, under a

short term appointment. Her contract was renewed on 15 August 1975, when she was appointed as a Shorthand-typist, at the G-3 level. On 1 January 1976, the Applicant's functional title was changed to Secretary, and she was promoted to the G-4 level. With effect from 1 July 1976, she obtained a fixed-term contract. On 1 January 1981, the Applicant was promoted to the G-5 level. On 1 July 1988, her title was changed to Programme Assistant. With effect from 1 January 1990, she was promoted to the G-6 level. On 1 January 1991, she was given a permanent appointment. From 16 October 1992 through 31 January 1994, the Applicant was assigned on mission with the United Nations Protection Force.

With effect from 1 January 1982, the Applicant while serving at the G-5 level, was transferred to a G-6 post, as Research Assistant with the Special Programme for Export Packaging (SPEP), Division of Interregional Programmes (DIP). The Applicant was granted a special post allowance to the G-6 level on 1 November 1982.

Following organizational changes in ITC, SPEP became the Functional Advisory Services Section (FASS), DIP's title was changed to Division of Specialized Services (DSS), and new directors were appointed.

In February 1985, the Appointment and Promotion Committee (APC) met for the 1984 end of year review. It appears that, despite the fact that the Applicant was on the seniority list for promotion to the G-6 level and for the granting of a permanent contract, her case was not considered. The reason was that the Director, DSS, had sent, on 19 February 1985, a performance evaluation report (PER) on the Applicant's performance from 1 June 1983 to 31 December 1984, with an overall rating that her performance did not fully meet standards. The PER's overall rating was then upgraded to "Fair" and the Applicant received a copy of it on 25 February 1985. The Applicant instituted a rebuttal against both versions of the PER on 1 April 1985.

On 23 August 1985, the Executive Director, ITC, endorsed the Rebuttal Panel's report on the PERs and the Applicant's overall performance rating was upgraded to "a good performance". The new PER and all relevant documentation were inserted in the Applicant's Official Status file in July 1987, after repeated requests from the Applicant. She was given a copy of the rebuttal report only on 24 May 1988. The Applicant also noted that there was a reference in the Panel's report to a memorandum dated 5 June 1985 from the Chief, FASS, concerning her transfer to another division, which she had never seen.

In the meantime, the Applicant's office had been moved into a storeroom. The Applicant had previously had to undergo two emergency hospitalizations in 1984 when she worked there, due to her allergy to dust. In June 1985, while the Applicant was on certified sick-leave, a doctor from the United Nations Joint Medical Service (UNJMS) called her in order to obtain the name of her private physician. The UNJMS called the Applicant's physician and allegedly informed him that if he did not immediately certify the Applicant as fit for work, her contract would be terminated. Consequently, the Applicant's physician certified her fit for work half-days, on a trial basis. The Applicant claimed that in July 1985, the same doctor from the UNJMS called her at work and told her that she should return to work full-time and that she needed psychiatric treatment as she was a hypochondriac. The UNJMS then contacted the Applicant's physician to certify that the Applicant was fit to work full-time but he apparently refused to do so.

In August 1985, the Applicant complained to the Director, Division of Personnel Management, ITC, about the attitude of the UNJMS doctor and the fact that no one had come to inspect her office as requested. On 15 October 1985, the Applicant sent a memorandum to another doctor of the UNJMS, requesting an inspection of her office. On 19 October 1985, two doctors inspected the office. They forwarded their report to ITC on 4 November 1985. On 13 November

1985, the Applicant wrote to the Executive Director, ITC, requesting that he take the action recommended by the report. In March 1986, she was moved into another office. On 5 March 1986, the Senior Export Packaging Adviser informed the Applicant that, due to her health, she would be relieved of her duties and put on an assignment basis.

At the end of March 1986, the Applicant was on sick-leave. She resumed her duties on a part-time basis on 1 April 1986. The Applicant had two consultations with a psychiatrist who concluded that she had no problems. On 31 July 1986, the UNJMS informed the Applicant that following the conclusions of both experts, she had to resume full-time work as of 4 August 1986.

On 11 June 1987, the Applicant wrote to the Executive Director, ITC, raising a number of issues, among them documentation she had not seen and discrepancies in her leave records, especially since 1983. In a reply dated 22 July 1987, the Chief, Staff Administration Section, informed the Applicant, inter alia, that the memorandum dated 6 August 1986 from the UNJMS had been placed in her Official Status File; that they had not received any communication pertaining to her sick-leave from 1 April to 4 August 1986; that the 18 days of sick-leave resulting from her accident in 1983 would be credited to her record, once ITC received the Advisory Board on Compensation Claim's opinion on the matter; and that they had never received a memorandum dated 5 June 1985 concerning her transfer.

On 14 December 1987, the Applicant was given her PER for the period 17 December 1986 through 15 October 1987, which gave her an overall rating of a "good performance". However, during the APC meeting on 15 December 1987, the Director, Division of Product and Market Development (DPMD) apparently gave a different verbal opinion of her performance. This is evidenced by a memorandum dated 28 January 1988 from the Executive Director, ITC, requesting that the Director, DPMD, provide the APC an overall assessment on the Applicant's performance through a memorandum that

would be copied to her. On 16 December 1987, the Chief, Personnel Administration Section (PAS), presented the Applicant with a P-5 Action Form from DPMD terminating her assignment. On 18 December 1987, the Applicant was hospitalized for cardiac problems and remained on sick-leave until February 1988.

On 15 June 1988, the PER covering the period 1 January 1985 through 16 December 1986 was presented to the Applicant, giving her an overall rating of "unsatisfactory". On 14 July 1988, the Applicant instituted a rebuttal against the PER. The Panel adopted its report on 26 October 1988 and decided that the rating should stand.

On 23 June 1988, the Applicant was informed by the Chief, SAS/DPFP, that the Chief, Market Development Service - Manufactured Products and the Director, DPMD, had not recommended the renewal of her contract beyond its expiry date, i.e. 30 June 1988. However, the Chief, SAS/DPFP, informed her that her contract would be renewed for 18 months and she would be transferred as of 1 July 1988 to the Office of the Executive Director, ITC.

On 2 November 1988, the Applicant was presented with the PER covering the period 17 December 1987 through 30 June 1988, which gave her an overall rating of "a performance that did not fully meet standards". The Applicant instituted a rebuttal on 1 December 1988. The Panel adopted its report on 25 April 1989, recommending that the PER be deleted from the Applicant's file.

By a memorandum dated 19 March 1990, from the Head, Regular Staff Unit, PAS, the Applicant was requested to sign her agreement to revised leave and absence records for 1986. The Applicant received an audit report on 26 February 1990, which led her to send a memorandum to the Executive Director, ITC, on 6 April 1990. In May 1990, she was reimbursed 13 days of salary as recommended in the audit report.

On 11 April and 15 May 1990, the Applicant wrote to the Chief, PAS, requesting that ITC provide her with comments on the

auditors' observations on her annual leave for the years 1975 and 1976. She further stated that if no action was taken to correct the errors, she would exercise her right of appeal.

On 20 June 1990, the Applicant wrote to the Secretary-Genera' requesting an administrative review of three administrative decisions: the refusal to provide her a copy of a memorandum dated 17 March 1986 sent by ITC to the UNJMS; the refusal to provide her with a copy of a memorandum dated 5 June 1985 from the Chief, FASS, to the Director, DPM; and the decision to block the correction of her leave records as per the audit Observation 89-23, dated 13 October 1989.

On 8 October 1990, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB). The JAB adopted its report on 15 April 1996. Its and conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 50. Regarding the non-transmission of copies of the first memorandum dated 5 June 1985 from the Chief, FASS/DSS, to the Director, DPM, and of the second memorandum dated 17 March 1986 from the ITC to the Joint Medical Service, the Panel concluded that, although the Appellant was not provided with copies of the two memoranda, she was regularly promoted and was offered a permanent appointment as of 1 January 1991, hence she did not suffer any prejudice to her career.
>
> 51. Considering the leave records, the Panel concluded that the ITC Administration did not keep in a proper and efficient manner those records and that therefore the ITC should bear the consequences of its negligence. The only way in order to determine precisely what is owed to the staff member would be a new audit, but the Panel believes that the actual damage is not worth such expenditures.
>
> 52. Consequently, the Panel recommends that the Appellant be given the benefit of the doubt regarding her annual leave and be credited with the 9 days of annual leave she claims."

On 26 June 1996, after reviewing the JAB report, the Secretary-General made the following decision:

> "The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Panel's conclusion that, although you were not provided with copies of two specific memoranda, you did not suffer any prejudice to your career, as you were regularly promoted and were offered a permanent appointment as of 1 January 1991. The Secretary-General has accordingly decided to take no action in respect of this issue.
>
> The Secretary-General has further taken note of the Panel's conclusion regarding your leave records and has decided to accept the Panel's recommendation that you be given the benefit of the doubt in respect thereof. Accordingly, he has decided that you be credited with the 9 days of annual leave you claim".

On 25 October 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The administrative decisions taken in the Applicant's case, and a misdiagnosis by the Joint Medical Service, caused her harm, as did delays in the handling of her case.

2. As a result, the Applicant is entitled to compensation, reimbursement of legal fees and retroactive promotion, as well as payment for eighty-two and one half days of annual leave, and a declaration that her PERs for 1985 and 1986 be considered null and void.

Whereas the Respondent's principal contentions are:

1. Any delay which occurred was not of such a nature as to constitute denial of justice or to entitle the Applicant to compensation.

2. The Applicant has not demonstrated exceptional reasons to justify the award of legal costs to the Applicant.

The Tribunal, having deliberated from 10 to 25 November 1997, now pronounces the following judgement:

I. The Applicant makes numerous claims for relief for actions and inaction by the Respondent that have prejudiced her career. Specifically, the Applicant requests that a decision by the Secretary-General accepting the recommendations of the Joint Appeals Board (JAB) be reversed; that certain documents be produced; and that she be compensated for harm suffered as a result of the Respondent's failure to produce those documents. In addition, the Applicant asserts that she has been a victim of harassment, arising from her supervisors' prejudice against her, which has caused her health to deteriorate. Furthermore, she contends that misdiagnosis by the UN Joint Medical Services contributed to her career problems. Moreover, leave records were not properly kept by the International Trade Centre (ITC). To remedy the results of these improper actions by the Respondent, the Applicant requests that she be paid for improperly deducted annual leave, be promoted retroactively, and that certain personnel evaluation reports (PERs) be declared null and void.

II. The Tribunal notes that, in the course of these proceedings, the Applicant has received all of the documents requested, with the exception of one memorandum of 1985 which apparently has been lost. On 26 June 1996, the Under-Secretary-General for Administration and Management wrote to the Applicant informing her that "although you were not provided with copies of two specific memoranda, you did not suffer any prejudice to your career, as you were regularly promoted and were offered a permanent appointment as of 1 January 1991." The Tribunal agrees with the Secretary-General's conclusion.

III. The JAB's report to the Secretary-General is an extensive analysis of the tortured record of the Applicant's service at the

ITC. That record reflects that for a number of years the Applicant received "good", "adequate performance" or "very good" evaluations and was promoted regularly. Beginning in 1981, the Applicant's poor health caused her to be absent from work frequently and to work irregular hours, with the result that supervisors noted her inability to perform the tasks necessary in the busy department. The Applicant asserts that the supervisors "harassed" her due to personal prejudice, which caused her health to fail. The Applicant alleges, further, that one doctor of the Joint Medical Service misdiagnosed her illness and acted unethically and with hostility. Neither of these claims has been brought before the JAB or other review body, and therefore neither is receivable by the Tribunal.

IV. The Applicant also requests promotion retroactively in substitution for a special post allowance granted from 1 November 1982 until 31 December 1989, and payment for annual leave from April 1986 to April 1988 that was "abusively" deducted. The Tribunal finds that both of these claims are time-barred, as the Applicant knew or had reason to know that the claims existed at the time of her letters of appeal to the JAB on 8 October 1990 and 8 February 1991, in which she challenged certain other leave issues. The JAB was not asked to consider the annual leave issue presented in this application but did review another annual leave question. The JAB recommended that the expense of an audit was not warranted, and the Secretary-General granted to the Applicant the 9 day leave adjustment requested. In her application, the Applicant asserts that 82 1/2 days of annual leave during a 2 year period should have been charged against sick leave. The Tribunal notes that the record reflects that in the five years prior to the period in question, the Applicant had been absent from work due to illness for periods ranging between 19 and 46 per cent of the total work days in each year. The Tribunal is of the view that the Applicant was fully aware of the applicable rules relevant to accumulation of sick and

annual leave, and consequently, should have made any such claims in the 1991 appeal to the JAB.

V. The Applicant also requests that PERs for the period 1 July 1985 to 16 December 1986 be declared null and void. The Tribunal consistently has taken the position that it does not interfere in the PER process unless there is evidence of prejudice. The Tribunal has examined the Applicant's PER rebuttal and the Rebuttal Panel's report and finds that there is no evidence of prejudice with respect to the PERs in question.

VI. Finally, the Applicant requests the Tribunal to find that the five-year delay between her appeal to the JAB and the Secretary-General's decision amounts to a denial of justice.

The Respondent has provided no explanation for the approximately five-year delay other than his limitations regarding staff resources and unusual difficulties in constituting review panels. These explanations, however well founded, do not justify such a delay in dealing with a recommendation by the JAB. (Cf. Judgements No. 414, Apete (1988) and No. 324, Riddler (1984)). The Tribunal does not agree with the Applicant's contention that this delay has caused injury to her career, as she has been promoted and awarded a permanent appointment during the period in question. However, the Tribunal finds that the Applicant should be compensated for the unjustified and unreasonable delay of five years in dealing with the claim.

VII. For the foregoing reasons, the Tribunal:

(a) Rejects the claims relating to harassment and to the Joint Medical Service as not being receivable by the Tribunal;

(b) Rejects the Applicant's claims relating to promotion and restoration of annual leave as time-barred;

(c) Orders the Respondent to pay the Applicant compensation in the amount of US$3,000 for the delay in handling her claim; and

(d) Rejects the remainder of her claims in their entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/845
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 845

Case No. 861: KNOWLES

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 22 April 1997, Raymond R. Knowles, a former staff member of the United Nations, filed an application in which he requested, in accordance with article 12 (now article 11) of the Statute of the Tribunal, the revision of Judgement No. 784, rendered by the Tribunal on 21 November 1996 "... on the grounds of discovery of a document the relevancy of which was unknown to the Applicant at the time that his application was submitted to the Tribunal. ..." and

"...

14. ... compensation for the damage done to the Applicant's reputation and career due to the false statements made by [the Director, Natural Resources and Energy Division[NRED]/ Department of Technical Cooperation for Development (DTCD)] to both DTCD management and to the ASG/OHRM [Assistant Secretary-General/Office of Human Resources Management]."

Whereas the Respondent filed his answer on 16 May 1997;

Whereas the Applicant filed written observations on 18 July 1997;

Whereas the facts in the case have been set forth in Judgement No. 784.

Whereas the Applicant's principal contention is:

The Tribunal should revise its judgement "on the grounds of discovery of a document the relevancy of which was unknown to the Applicant at the time that his application was submitted to the Tribunal."

Whereas the Respondent's principal contention is:

This application for revision fails to introduce any fact of a decisive nature which was unknown to the Tribunal and also to the Applicant at the time of the Judgement; therefore, Judgement No. 784 does not qualify for revision under Article 11 of the Tribunal's Statute.

The Tribunal, having deliberated from 7 to 25 November 1997, now pronounces the following judgement:

I. The Tribunal recalls that article 11 of its Statute reads, in relevant part, as follows:

> "The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement ..."

The Tribunal underlines that the fact on which the request for revision is based must have been "when the judgement was given, unknown to the Tribunal and also to the party claiming revision".

The Applicant introduces an allegedly newly discovered document "the relevancy of which was unknown to the Applicant at the time his application was submitted to the Tribunal". The document is a memorandum from the Applicant to the Director of the Department of Technical Cooperation for Development on "Clarification of my contribution to the publication of the Natural Resources Forum" in which he described the functions he was fulfilling.

II. The Tribunal notes that the document presented by the Applicant as the "new fact" cannot have been unknown to him when the judgement was given, as he was himself the author of this document. Accordingly, the Tribunal finds that the document does not meet the criteria necessary to fulfil the requirements for revision required by article 11 of the Tribunal's Statute. Thus, revision of Judgement No. 784 is not warranted.

III. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Julio BARBOZA
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/846
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 846

Case No. 618: NARULA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 16 January 1997, Ashwani Kumar Narula, a former staff member of the United Nations, filed an application in which he requested the implementation of Judgement No. 581, rendered by the Tribunal on 19 November 1992;

Whereas the Applicant, after requesting the production of certain evidence and the holding of oral proceedings, requested the Tribunal, inter alia, as follows:

"...

To order the Respondent [to take] the following redress measures:

(a) To find further employment for the Applicant in accordance with the Administrative Tribunal's Judgement No. 581;

(b) To pay to the Applicant [his] full salary, allowances, pension and other benefits, perquisites and other entitlements for the period between the date of separation [from] service and the date of the Applicant joining [his] new employment ... in accordance with the Tribunal's Judgement No. 581 ...

..."

Whereas the Respondent filed his answer on 28 February 1997;

Whereas, on 21 March 1997, the Applicant submitted written observations;

Whereas, on 18 November 1997, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case have been set forth in Judgement No. 581.

Whereas the Applicant's principal contention is:

The Respondent is in contempt of the Tribunal by failing to abide by its order to re-employ the Applicant in the United Nations or an agency thereof. As compensation, therefore, the Applicant is entitled to receive his full salary and benefits between the date of his separation and his re-entry in service.

Whereas the Respondent's principal contention is:

The Respondent has implemented the judgement of the Tribunal by making good faith efforts to find employment for the Applicant.

The Tribunal, having deliberated from 7 to 25 November 1997, now pronounces the following judgement:

I. The Applicant has requested that the Tribunal render an interpretation of its Judgement No. 581. The Tribunal has consistently followed the precedent established by Judgement No. 61: Crawford and Others (1955), in which it held that it is competent to interpret its judgements in accordance with the general principles set out by the International Court of Justice in the Asylum case. (Request for interpretation of the Judgement of November 20th, 1950

in the Asylum case, Judgement of November 27th, 1950; I.C.J. Reports, 1950, p. 402). (Cf. Crawford, paragraph 3).

II. On 19 November 1992, the Tribunal rendered Judgement No. 581, which was transmitted to the parties in January 1993. The Tribunal ordered the Respondent "to pay to the Applicant the amount of six months of his net base salary at the rate in effect on the date of his separation from service" (paragraph X). In addition, the Tribunal made the following observation:

> "XI. The Tribunal also expresses the wish that the Respondent should find further employment for the Applicant on the staff of the United Nations or an agency thereof, appropriate to his qualifications and experience."

As a result of this Judgement, the Respondent, in mid-1993, had the candidature of the Applicant reviewed by eight different Divisions of the Economic and Social Commission for Western Asia. He also referred the candidature of the Applicant to the Economic and Social Commission for Asia and the Pacific and to the then Department of Economic and Social Development. These efforts apparently did not result in any job offers to the Applicant.

III. The Tribunal notes that the Respondent has paid the Applicant six months' salary, as the Tribunal ordered. The Tribunal must now consider the nature of its observation that it "wished" the Respondent to find the Applicant further employment, either within the Organization or in one of its specialized agencies. The Tribunal recalls that its practice is to issue orders to the Respondent in those cases in which an applicant prevails. These orders are binding on the Respondent. In Judgement No. 581, the Tribunal issued an order of payment by the Respondent to the Applicant, which order has been implemented. However, in expressing a wish that alternative employment be found for the Applicant, the

Tribunal purposely avoided the use of terminology indicating an order. Hence, the wish that the Respondent find alternative employment for the Applicant did not rise to the level of an order and cannot be interpreted as having the same force.

IV. The Tribunal recognizes that the Respondent has made efforts to find the Applicant further employment, but without success. Given these efforts and the payment to the Applicant of six months' salary, the Tribunal finds that the Respondent has fully complied with his obligations under Judgement No. 581.

V. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Julio BARBOZA
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

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LIMITED

AT/DEC/847
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 847

Case No. 933: WYSS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 31 July 1996, Elisabetta Wyss, a staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application containing, inter alia, the following pleas:

> "8. ... that the UNAT quash the purported decision of the Secretary-General to defer the recommendation of the ... Joint Appeals Board (JAB) dated 23 January 1996, ..., and to quash the subsequent purported decision of the Secretary-General (...) on 6 May 1996 (...) to reject the Applicant's further request (...) that the recommendation of the JAB be either unequivocally accepted or rejected. ...
>
> 9. ... that the Tribunal order the Secretary-General to strictly implement and execute the conclusion and recommendation of the JAB (i.e., that the Applicant's effective date of promotion be set as 1 July 1991, ...), and/or in the alternative, to award the Applicant compensation, costs, and damages for the injuries she suffered from the denial of due process, procedural and ... inexcusable delay ... in resolving her appeal, ..."

Whereas the Respondent filed his answer on 17 December 1996;

Whereas the Applicant filed written observations on 26 March 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 9 September 1974, as a Clerk/Typist on a short-term appointment for two months, which was followed by further short-term appointments until 1 June 1975, when she was given a one-year fixed-term appointment as a Bilingual Typist/Clerk at the G-3, step III level in the Fund Raising Section, External Affairs Division, UNHCR. Her appointment was subsequently extended and, on 1 October 1976, she was promoted to the G-4 level. On 1 November 1977, the Applicant's functional title was changed to Administrative Clerk. On 1 January 1978, her appointment was converted into an indefinite appointment. On 1 August 1978, the Applicant was promoted to the G-5 level and, on 1 May 1981, to the G-6 level, with a change in her functional title to Principal Administrative Clerk. On 6 May 1982, the Applicant was transferred to the Assistance Division, Procurement Unit, and her functional title was changed to Principal Procurement Clerk. On 16 June 1987, the Applicant was reassigned to the Regional Bureau for South West Asia, North Africa and the Middle East (SWANAME), as a Programme Assistant. On 1 January 1992, her functional title was changed to Senior Programme Assistant. On 1 July 1992, she was promoted to the G-7 level.

The Applicant had been recommended for promotion to the G-7 level by her successive supervisors on several occasions since 1989. In a memorandum to the Chairman, Appointments, Promotions and Postings Committee (APPC), dated 28 April 1989, the Desk Officer, Afghanistan and Pakistan, recommended the Applicant for promotion to the G-7 level, underlining her efficiency, competence and potential managerial and problem-solving skills. On 23 May 1990, a similar recommendation from the Director, Regional Bureau for SWANAME, was sent to the Secretary of the APPC. The results of the

reclassification exercise of Programme Assistant posts were published under cover of a memorandum from the Director, Division of Human Resources Management (DHRM), dated 28 October 1991. The post encumbered by the Applicant was classified at the G-7 level, with effect from 1 July 1990.

The grading of the Programme Assistant posts was considered during the Special APPC Session undertaking held in conjunction with the 1991 Annual APPC Promotion Review Session. The Applicant's name was not included in the list of staff promoted to the G-7 level circulated under cover of a memorandum dated 3 April 1992. On 9 April 1992, the Applicant wrote to the Chairman of the APPC, enquiring about the reason for her non-promotion to the G-7 level, since her post had been classified at that level. In a reply dated 10 April 1992, the Secretary of the APPC transmitted the excerpt of the relevant paragraph of the APPC Minutes concerning the recommendation for the Applicant's promotion. The excerpt stated that "[t]he Committee felt unable to promote any G-6 staff members in the SWANAME Bureau to the detriment of another Bureau[']s] quota."

On 14 April 1992, the Applicant lodged a recourse with the Chairman of the APPC. She enclosed a "Note for the File" dated 27 March 1992, in which the Director, DHRM, stated that "Promotion possibilities to the G-7 level for Programme Assistants working in a given Bureau should not be limited to the number of G-7 Programme Assistant posts in that Bureau".

On 18 May 1992, the Applicant wrote to the Chairman of the Staff Council concerning the unbalanced representation of the APPC members designated by the Staff Council among the APPC Recourse Session for promotion of Programme Assistants at Headquarters. On 25 May 1992, the Director, DHRM, addressed a memorandum to the Chairman of Staff Council on this matter, explaining that the three persons designated by the Staff Council were not entitled to sit in sessions dealing with promotion or recourse to the G-7 level in view of their grade.

On 1 June 1992, the Secretary of the APPC informed the Applicant that the APPC had decided to maintain the decision not to recommend her for promotion.

On 27 July 1992, the Applicant wrote to the Secretary-General, requesting a review of the administrative decision not to promote her to the G-7 level.

In the meantime, the results of the 1992 Annual APPC Session were published under cover of an Inter-Office Memorandum dated 23 October 1992. The name of the Applicant was included on the list for promotion to the G-7 level, with effect from 1 July 1992. The Applicant was informed accordingly on 26 October 1992.

The Applicant lodged an appeal with the Joint Appeals Board (JAB) on 1 December 1992. The JAB adopted its report on 23 January 1996. Its findings, conclusion and recommendation read, inter alia, as follows:

"...

29. The members of the Panel, having considered the case, noted some facts that constituted irregularities in the procedure followed by the APPC:

(a) It appears that there was an unbalanced composition of the APPC during the Special Session of April 1992. The Committee justified this unbalance by the fact that members graded under G-7 could not participate [in] this Special session dealing with promotion to [the] G-7 grade.

(b) The members of the Panel noticed that the APPC did not justify why it did not apply the Note for the File of 27 March 1992 jointly signed by the then Director, DHRM and the Chairman of the Staff Council, stating that 'promotion possibilities to the G-7 level for Programme Assistants working in a given Bureau should not be limited to the number of G-7 Programme Assistants in that Bureau ...'

30. In the opinion of the Panel, a relevant fact of this case concerns the reclassification of the Appellant's post from G-6 to G-7, [which was] notified to the staff member on

28 October 1991 under cover of a memorandum from the then Director, DHRM, specifying that the effective date of reclassification of her post was 1 July 1990. At the 3 April 1992 Special Session, the APPC refused to recommend the Appellant for promotion on the grounds that there was already a G-7 post in that Bureau, without apparently taking into consideration the recent reclassification of the Programme Assistant post. ...

31. When the Appellant was finally promoted on 23 October 1992, she was notified that the effective date of her promotion would be 1 July 1992. The Panel realizes that the classification of the post, the date of its effectiveness and the grade of the staff member performing may not be identical. Furthermore, if the Secretary-General decides to promote a staff member, he has a discretionary authority to determine the effective date of promotion. Regarding this specific point, the Panel believes that if the APPC had examined all the relevant elements at the Special Session on 3 April 1992, it could have recommended the Appellant for promotion at the same effective date as the other staff members recommended for promotion at this Session. Thus the Appellant would have been promoted with effect... [from] date 1 July 1991.

Conclusion and recommendation

32. The Panel concludes that, although promotion is not a right for the staff member and the Secretary-General has a discretionary power on promotion, the APPC when recommending an effective date of promotion had not examined all the relevant elements of the file.

33. In view of the foregoing, the Panel recommends that the Appellant's effective date of promotion be 1 July 1991, i.e. the effective date adopted for the other staff members promoted by the APPC at its 3 April 1992 Special Session.

Special Remark

34. The Panel wishes to draw the attention of the APPC [to] the importance of acting in strict compliance with its mandate, particularly regarding procedural matters."

On 22 February 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report and accepts its finding that the Appointment Promotions and Postings Committee, (APPC), Special Session of 3 April 1992 had not examined all relevant elements of your case, in particular those determining whether the effective date of your promotion should have been 1 July 1991 or 1 July 1992. However, the Secretary-General cannot agree with the Board's finding that the date of 1 July 1991 should apply, because determination of this issue falls under the exclusive competence of the APPC, before the final decision of UNHCR's High Commissioner. For this reason, the Secretary-General has decided to reject the Board's recommendation and has deferred your case to UNHCR's High Commissioner so that she may submit your appeal to the APPC to consider the effective date when your promotion should become effective, giving in this process all due consideration to your arguments and to the JAB's comments.
>
> ..."

On 12 April 1996, the Applicant requested the High Commissioner not to submit the Applicant's case to the APPC but to take a decision on the JAB's recommendations.

On 6 May 1996, the Senior Legal Adviser, DHRM, UNHCR, rejected the Applicant's request. The case was subsequently remanded to the APPC, which made no recommendation in support of the appeal. This conclusion was accepted by the High Commissioner, who decided to maintain 1 July 1992 as the effective date of the Applicant's promotion.

On 31 July 1996, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant would have been promoted to the G-7 level with effect from 1 July 1991, but for the procedural and substantive irregularities occurring at the Special Session of the APPC of April 1992.

2. The Secretary-General's failure to take a decision on the JAB's recommendation was an abuse of discretion.

Whereas the Respondent's principal contention is:

The Secretary-General's decision to remand the Applicant's case to the UNHCR APPC did not violate the Applicant's rights.

The Tribunal, having deliberated from 11 to 25 November 1997, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board (JAB) that her promotion be implemented with effect from 1 July 1991. The Applicant challenges the recommendation of the Appointments, Promotions and Postings Committee (APPC) to recommend her for promotion to the G-7 level, with effect from 1 July 1992. She claims that the recommendation for her promotion was not objectively considered by the APCC at its Special Session due to its irregular composition.

II. The Applicant is not requesting the Tribunal to substitute its own judgement for that of the Secretary-General by promoting her to the G-7 level, since she received this promotion on 1 July 1992. Instead, she is contesting the effective date of this promotion. Therefore, the central issue in the case is whether the Applicant's rights were violated by the administrative decision not to grant her the promotion to the G-7 level with effect from 1 July 1991, instead of 1 July 1992.

III. The Applicant contends that the Special Session of the APPC of April 1992 was tainted by procedural and substantive irregularities. With respect to the procedural irregularity, the Tribunal notes that the Secretary-General, in the JAB proceeding, admitted that the composition of the Special Session was in fact irregular. Further, the Respondent, in his submission before the

IX. All other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Julio BARBOZA
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/848
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 848

Case No. 936: KHAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Rubina Khan, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1995 and to 31 March, 30 June and 30 September 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 30 June 1996, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 19 August 1996, the Applicant filed a corrected application, requesting the Tribunal to rule that:

"(i) The JAB [Joint Appeals Board] erred in finding that the Administration had made no binding commitment to promote the Applicant to the P-5 level.

(ii) The Applicant's right to due consideration to fill a P-5 post, number UNA-11110-E-P-5-002, was violated when the said post was given to an outside candidate without advertisement and without offering the Applicant any explanation.

(iii) In the absence of an up-to-date performance evaluation report (PER), the Applicant's candidacy

was not properly reviewed and her merit not properly considered by the APB [Appointment and Promotion Board].

(iv) For want of proper consideration of the Applicant's candidacy for promotion to the P-5 level, the decision of the APB not to include her in the 1992 promotion register cannot stand.

(v) The Secretary-General erred in upholding the JAB's recommendation not to support the appeal.

(vi) There is a special burden of proof on the Respondent as a result of the Applicant's gender which was not discharged.

7. Accordingly, the Applicant prays the Tribunal to order (a) that she be fully and fairly considered for promotion to the P-5 level at the earliest possible date; and (b) the Respondent to compensate her in the amount of $35,000 for personal injury, humiliation and stress suffered as a result of [the] unfair treatment she has received."

Whereas the Respondent filed his answer on 6 February 1997;

Whereas the Applicant filed written observations on 10 March 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 24 April 1977, on a one year, fixed-term appointment, as an Associate Expert (General Economics) at the L-1, step II level in Georgetown, Guyana. Her contract was subsequently extended until 16 February 1981, when she became an Associate Officer, at the P-2, step IV level, on a six-month fixed-term appointment, in the Office of the Director-General (ODG) for Development and International Cooperation at Headquarters. Her fixed-term appointment was extended until 15 November 1982, when it expired and the Applicant separated from service. On 13 December 1982, the Applicant was given a consultancy contract until 12 February 1983. This was converted into a short-term appointment until 12 August 1983, when

she separated from service. With effect from 13 April 1984, the Applicant was given a two-year, fixed-term appointment as an Economic Affairs Officer, at the P-3, step I level in the ODG for Development and International Cooperation. Her appointment was successively extended, and, on 1 April 1987, she was promoted to the P-4 level. On 1 August 1989, the Applicant's appointment was converted to probationary and, on 1 April 1991, to permanent. On 15 September 1992, the Applicant was assigned to the United Nations Operation in Mozambique.

On 1 May 1991, the Applicant wrote to the Director-General for Development and International Economic Cooperation (DIEC), requesting that she be recommended for promotion to the P-5 level, claiming that (i) "ever since [she] had been in the Director-General's Office [she] had been placed against a P-5 post", (ii) the Office had indicated that "it was justified to promote her to P-4 against a P-5 post because [she] was in fact performing [her] functions at the P-5 level" and (iii) she had been at the P-4 level since 1987 and her performance had been rated "very good".

In a Note for the File dated 27 February 1992, the Director-General for DIEC recorded that the Applicant had been working in that Office since 1981, was "extremely intelligent and ha[d] a special capacity to immerse herself completely in whatever duties [were] assigned to her", and "deserve[d] to be promoted to a higher grade which so far had not been possible as the Office did not have a P-5 post." He concluded by "strongly recommend[ing] that [the Applicant] be favourably considered for promotion at the earliest opportunity".

An ODG/DIEC Staffing Situation table as of 1 March 1992 listed the Applicant on post number UNA-28833-E-P-4-003, a "post on loan" from and to be returned to the Department of Administration and Management. It further stated that she was to encumber post number UNA-11110-E-P-5-002 when the staff member holding that post would be seconded to UNDP in April 1992. This "solution" also was

1992". The Applicant also sent another copy of the 8 November 1994 statement with the notation thereon over her signature: "The current year's figure (1992) should read B 601,576".

On 2 February 1995, the Acting Executive Secretary wrote to the Assistant Secretary-General for Human Resources Management (OHRM) pursuant to ST/AI/371, stating that the Applicant appeared to have altered the attestation of annual earnings in respect of her husband for the year 1992. The effect of the alteration was to reduce the total earnings of the Applicant's husband to an amount less than the established earnings limit for the year, thus qualifying the Applicant for payment of the dependency allowance in respect of her husband.

On 22 March 1995, the Acting Executive Secretary wrote to the Applicant, informing her of allegations of misconduct against her; in particular, the Applicant was charged with having altered the AIT Statement from BAHT 681,576 to BAHT 601,576. On 7 April 1997, the Applicant advised the Deputy Executive Secretary of ESCAP that "when I received the certificate of evidence dated 8 November 1994, I noticed that the expiry date of current contract was March 1977, which was wrong. As the matter was two years old and urgent, I immediately telephoned the AIT office and I read out what was certified and I was told that the expiry date should be March 1997 and the amount of the earnings should be B601,576. That is why when I was requested by Personnel, I confidently certified that figure was correct."

On 10 April 1995, the Applicant resigned for "family reasons". On 17 April 1995, she asked that other options less drastic than resigning be considered, such as compassionate leave so that she could be with her daughter, who had been the victim of an accident. She was permitted to withdraw the resignation.

On 18 April 1995, the Applicant wrote to the Deputy Executive Secretary, as follows:

"Since November 1991 I have suffered a tragedy and several setbacks in my personal life, which I am unable to put down on paper, and about which the Administration is only partly aware ... I have gone from one crisis situation to another, and have tried to deal with it as best as I could, but was unable to seek advice or help from anyone. I can talk about that in person to anyone from the Administration.

As I think about my action, I realize that I was completely out of my senses, as I did not even think that what I did would be considered as a crime."

On 7 May 1995, the Applicant wrote to the Deputy Executive Secretary, noting that:

"As I have explained in my memo of 7 April, when I received the 1992 certification, I noticed that the date of expiry of the contract was wrong. When I contacted AIT, I was informed not only about the date but also about the total earnings. While still married but estranged, I am not sure whether I was duped into changing the figure or I heard the figure wrong. Whatever it was, [with] hindsight, I do feel that I could have easily avoided committing such an irregular act by simply requesting ... another certificate. However, ... [m]y anguished state of mind must have weakened my judgement.

As I had not doubted that the correct figure was Baht 601,576, when the Personnel Section approached me to verify the figure I readily did so."

On 12 October 1995, the Assistant-Secretary General for OHRM wrote to the Chairperson of the Joint Disciplinary Committee (JDC), referring the Applicant's case to that body. The JDC adopted its report on 5 April 1996. Its conclusions and recommendations read, in part, as follows:

"15. The Committee noted that the problem started through negligence of the staff member in failing to complete the form for her spouse's 1992 earnings. This contributed to the sense of urgency when the required information actually did arrive from the employer.

...

be time-barred under staff rule 111.2(a), the Administration had made no administrative decision regarding the placement of the Appellant against a P-5 post. The Panel accordingly determined that this aspect of the Appellant's case was not receivable.

23. With respect to the Organization's failure to include the Appellant in the 1992 P-5 Promotion Register, the Panel observed that the Chairperson of the APB had advised the Appellant by letter dated 17 November 1993 that the Board had given 'full and careful consideration' to her recourse letter of 29 July 1993 and found that, 'notwithstanding the additional information presented in [her] communication, [its] re-examination of [her] case did not reveal that there were sufficient grounds to amend its previous decision'. The Panel considered such letter to constitute an 'administrative decision' against which the Appellant could appeal. The Panel accordingly considered the merits of this aspect of the Appellant's case.

B. The Substance of the Appeal

...

25. In the present case, the Appellant's name did not appear on the 1992 P-5 Promotion Register (ST/IC/1993/35) (24 June 1993). On 29 July 1993, the Appellant instituted a recourse procedure in accordance with Information Circular ST/IC/1993/35 against the non-inclusion of her name in the Register. ...

26. The Panel found that the Appellant had not alleged nor provided evidence of prejudice or any other extraneous factor leading to the 17 November 1993 decision of the APB not to include her name in the 1992 P-5 Promotion Register. Accordingly, the Panel found no justification for the Appellant's challenge against such decision on these grounds. While not sufficient to vitiate the APB's decision, the Panel did consider it unfortunate that the Appellant, and thus the APB, did not have PERs on her performance during the three years preceding her consideration for promotion to the P-5 level. The Appellant's most recent PER at that time covered the period from April 1989 through April 1990. The Panel considered that the lack of more recent PERs might have hindered the APB in its review.

27. The Panel next considered whether there had been 'a legal obligation binding on the Secretary-General' with respect to the promotion of the Appellant to the P-5 level. See, e.g., Judgement No. 134 (Furst).

...

30. ..., the Panel found that the Administration had made no binding commitment to promote the Appellant to the P-5 level. The Panel, however, considered it unfortunate that the Appellant, as early as 1992, was given reason to believe that she would be 'favourably considered for promotion [to the P-5 level] at the earliest opportunity' and yet, more than three years later, she had not received such a promotion. As the Administrative Tribunal has stated, 'the Administration must behave responsibly in its administrative arrangements and refrain from expressing hopes or intentions it has no expectation of fulfilling ...'. Judgement No. 444 (Tortel). The Panel further noted that the restructuring of first DIEC and then DESD might have had a detrimental effect on the Appellant's situation.

31. The Panel trusts that the Appellant will receive the full and fair consideration to which she is entitled for promotion to a vacant P-5 post for which she is qualified. In this respect, the Panel noted the applicability of the special measures to improve the status of women in the Secretariat set forth in ST/AI/382 (3 March 1993).

Recommendation

32. In light of the Panel's foregoing considerations, the Panel makes no recommendation in support of the subject appeal".

On 1 May 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in the light of the Board's report and has noted that it made no recommendation in support of your appeal. Accordingly, the Secretary-General has decided to take no further action on your case.

On 10 June 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JDC report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Committee's report. He has accepted the Committee's conclusion that the charges brought against you of false certification, forgery, attempted fraud and misrepresentation in connection with your submission of an altered document in support of a request for payment of dependency benefits for the year 1992 were substantiated. He is also in agreement with the conclusion of the Committee that your conduct constituted a violation of your obligations under staff regulation 1.4, which requires staff members to conduct themselves at all times in a manner befitting their status as international civil servants, and a violation of the standards of integrity expected of all international civil servants.
>
> The Secretary-General has given careful consideration to the Committee's recognition of mitigating circumstances in your case and to your 18 years of satisfactory service. He has also given consideration to the seriousness of your actions in the light of your position as a senior official in the Organization, especially one with certifying authority. Considering all of the circumstances, the Secretary-General has concluded that your conduct constituted a serious violation of the UN standards of conduct and integrity expected of each staff member of the Organization and that this misconduct is incompatible with continued service with the Organization.
>
> In the light of this conclusion, the Secretary-General cannot accept the Committee's recommendation regarding disciplinary measures. Pursuant to his discretionary authority to impose an appropriate disciplinary measure for misconduct, the Secretary-General has decided to separate you from service with compensation in lieu of notice under staff regulation 10.2, paragraph 1 and staff rule 110.3(a)(vii) with effect from the date you receive this letter. The Secretary-General has also decided that, given the nature of the offence, no indemnity will be paid under Annex III(c)."

On 18 December 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JDC committed two procedural errors, which are uncontested by the Respondent and which amount to a denial of the high standard of due process to which the Applicant was entitled.

2. The extreme sanction imposed by the Organization from its Headquarters in New York was neither proportional nor appropriate to the actions of the Applicant and, further, did not conform to the findings or recommendations of those at the duty station.

Whereas the Respondent's principal contentions are:

1. Staff who obtain allowances or benefits on the basis of certification that proper information is supplied are responsible to ensure that such information is correct.

2. Disciplinary action is not criminal in nature. Once prima facie evidence of misconduct is established, the staff member has the onus to rebut it.

The Tribunal, having deliberated from 6 to 26 November 1997, now pronounces the following judgement:

I. The Applicant is appealing a decision of the Secretary-General not to accept the recommendations of the Ad hoc Joint Disciplinary Committee (JDC) but to separate her from service due to misconduct. In addition, her pleas to the Tribunal include, as a preliminary measure, that the Tribunal order the Respondent to communicate to the Applicant the "broad guidelines on sanctions applicable in cases of misconduct" as well as other information.

II. Regarding the Applicant's plea for this preliminary measure, the Tribunal recognizes the Respondent's admission that the Applicant was not provided with the "broad guidelines on sanctions

with respect to this claim, the Applicant's appeal is time-barred. Accordingly, the Tribunal has not considered the merits of this claim.

III. The second and more important issue in this case is whether the Applicant's rights were violated for want of proper consideration of her candidacy for promotion to the P-5 level. Further, the Tribunal must consider whether there was a binding promise to promote the Applicant to the P-5 level.

IV. The Applicant contends that in May 1991, she received an oral promise from the Director-General for Development and International Economic Cooperation (DIEC) to promote her to the P-5 level. In support of this contention, the Applicant refers to a Note for the File dated 27 February 1992, which recommends the Applicant for promotion and asks that consideration be given to this issue. However, the Note does not contain a binding promise to promote the Applicant. Accordingly, the Tribunal is unable to conclude that a binding commitment existed to promote the Applicant.

V. Next, the Tribunal must consider whether the Applicant's rights were violated by the manner in which the P-5 post, to which the Applicant claims she should have been assigned, was filled. The Tribunal notes that the P-5 post the Applicant was seeking was filled by an external candidate through what is alleged to have been a "private arrangement", without having been advertised. This appears to be a violation of staff regulation 4.4 which reads as follows:

> "Subject to the provisions of Article 101, paragraph 3, of the Charter and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations."

VI. The Tribunal has held on numerous occasions that staff members already employed by the United Nations have a right to the fullest consideration for appropriate vacancies. The breach of staff regulation 4.4. constitutes a violation of the Applicant's rights. (Cf. Judgements No. 310, Estabial (1983) and No. 362, Williamson (1986)). The manner in which the post was filled deprived the Applicant of her right to due consideration for promotion to the P-5 level. The Tribunal considers that, in accordance with its jurisprudence, the Applicant had a statutory right to due consideration of her candidature for post number UNA-11110-E-P-5-002. The failure of the Administration to do so violated her rights and she is therefore entitled to compensation.

VII. In addition, the Tribunal considered whether the fact that there was no up-to-date PER violated the Applicant's rights to full and fair consideration for promotion to the P-5 level. The Tribunal has repeatedly held that the Organization must comply with its own procedures, which include the timely evaluations of a staff member's performance. "It is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up-to-date, and submitted in a timely fashion. The Tribunal finds that the Applicant's right to be duly considered for inclusion in the ... Promotion Register was not fully respected and, as a consequence, the responsibility of the Organization is engaged." (Cf. Judgement No. 586, Atefat (1992)). For this, the Applicant is also entitled to compensation.

VIII. For the foregoing reasons, the Tribunal orders the Respondent:

1. To consider the Applicant fully and fairly for promotion to the P-5 level as soon as possible; and

2. To pay the Applicant an amount equal to four months of her net base salary, at the rate in effect on the date of this

judgement, as compensation for the procedural irregularities set forth in paragraphs VI and VII above.

IX. The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/849
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 849

Case No. 935: VON SETH

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Carl Fredrik von Seth, a former staff member of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 May, 31 August and 30 November 1995 and to 28 February, 31 May and 31 August 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 9 August 1996, the Applicant filed an application containing pleas which read, in part, as follows:

"8. ... requests the Tribunal to find:

(a) that the harsh and unreasonable administrative decision to dismiss the Applicant was unjustified and led to irreparable damage to the personal and professional image and reputation of the Applicant;

(b) that the rationale justifying the Respondent's decision to separate the Applicant was motivated by extraneous factors including false rumours;

(c) that the Applicant was denied proper redress through a procedure established by the Secretary-General and

that the irregularities of the JDC [Joint Disciplinary Committee] proceeding occasioned a lack of due process;

(d) that the Applicant was subjected to a disciplinary proceeding and subsequent alleged errors which pertained to the Applicant's performance and not his conduct;

(e) that performance falls within the competence of supervisory officials and is not subject to disciplinary measures and consequently, the entire matter was a procedural error as it should have been assessed under Chapter XI not X of the Staff Regulations and Rules;

(f) that notwithstanding the impropriety of a JDC in this instance, the findings exonerated the Applicant.

9. The Respondent denied the Applicant his due process rights in the manner which follows:

(a) by not respecting paragraph 6 of ST/AI/371 and denying [the] Applicant the right to comment on the allegation before the review;

(b) by not respecting paragraph 20 of ST/AI/371;

(c) by allowing the Respondent to use evidence in the hearing, [which evidence was] denied to the Applicant until after the proceedings;

(d) by the acceptance of [an] unsubstantiated rumour to be cited as fact and [by] shifting the burden of proof to the Applicant to prove unknown rumours were false ...

10. ...

(a) to order that the decision to dismiss the Applicant for misconduct, conveyed to the Applicant on 8 November 1994 by letter of 1 November 1994 ..., be rescinded and to order the Applicant ... reinstated as of 8 November 1994;

(b) alternatively, to order that the Applicant be awarded the payment of two years' net base salary in lieu of notice;

(c) and to order an amount the Tribunal deems appropriate as an additional monetary sum in compensation for the moral suffering and professional prejudice inflicted on the Applicant."

Whereas the Respondent filed his answer on 10 June 1997;

Whereas, on 27 October 1997, the Applicant filed written observations;

Whereas the facts in the case are as follows:

The Applicant, a national of Sweden, entered the service of UNHCR on 14 April 1985, on a one-year fixed-term appointment, on secondment from his Government, as a Protection Officer in Maputo, Mozambique, at the P-3, step VI level. After successive renewals of this appointment and reassignment to Lubumbashi and Dilolo, Zaire, and to Karachi, Pakistan, the Applicant received a three-year fixed-term appointment on 1 January 1990, which was renewed for another three years, on 1 January 1993.

With effect from 12 March 1991, the Applicant was assigned to the UNHCR Branch Office in Amman, Jordan, as a Senior Protection Officer, with a special post allowance to the P-4 level. On 3 December 1992, the Applicant was put on special leave with full pay until 23 March 1993. Between 24 March and 24 June 1993, the Applicant was sent on mission to Sudan. Upon his return, he was again put on special leave with full pay, until his separation from service on 8 November 1994.

According to the files, the Applicant met a Jordanian citizen, Mr. X, in August 1991, when the latter came to the Amman Office to submit a job application. Although there were no vacancies at that time, Mr. X began to frequent the Amman Office, offering his services to the Office staff. According to the UNHCR Representative in Amman (the UNHCR Representative), he had warned the Amman Office staff, including the Applicant, in April and May 1992, to avoid Mr. X since information had come to light that

Mr. X's prior employment with the European Economic Community delegation had been ended due to improper use of his position. Despite this warning, Mr. X continued to visit the Amman Office.

On 4 November 1992, the UNHCR Representative sent two notes for the file dated 28 September 1992 and 4 November 1992, to the Chief of the Regional Bureau for South-West Asia, North Africa and the Middle East (SWANAME), UNHCR, Geneva. These communications concerned an allegation that Iraqi asylum seekers might have obtained refugee status and subsequent resettlement through payment of large sums of money to Mr. X.

The UNHCR Representative's note to the file dated 28 September 1992 concerned suspicions that the Applicant might have improperly granted refugee status to two Iraqi asylum seekers, whose previous requests to obtain that status had been rejected in letters signed by the Applicant. Suspicion of the Applicant arose from alleged procedural irregularities and from the fact that one of the asylum seekers was a brother-in-law of Mr. X. The Applicant denied that he had known about this family relationship.

The UNHCR Representative's note to the file dated 4 November 1992 concerned another incident in which an Iraqi asylum seeker, Mr. Y, had paid US$5,000 to Mr. X who, in return, promised to have him resettled in a third country through UNHCR, using his special relationship with "Carlo", which was apparently another name for the Applicant.

On 6 November 1992, the Regional Resettlement Officer, UNHCR, Nairobi, claimed to have lost US$5,000 in June 1991 and suspected that the Applicant had taken the money. The Regional Resettlement Officer alleged that in June 1991, he had requested the Applicant to hold US$5,000 in the Amman Office for safe keeping and, in the presence of another officer, Mr. W, had transferred the money to the Applicant. However, Mr. W was not able to confirm the Regional Resettlement Officer's version of events. In August 1991, when the Regional Resettlement Officer inquired about the money, the

Applicant denied having ever received any money from him. After allegedly numerous attempts by the Regional Resettlement Officer to reclaim the money, the Applicant gave him a US$1,000 cheque "because he felt sorry for him".

An administrative investigation of this matter was conducted by the Acting Director, SWANAME, in Amman between 11 and 14 November 1992. The investigation revealed, inter alia, that Mr. X was well known in the Iraqi refugee community in Amman and that, apparently, there were persistent rumours about a partnership between Mr. X and the Applicant.

On 17 November 1992, the UNHCR Representative wrote to the Chief, SWANAME, that, as a result of the administrative investigation, he had asked the Applicant to take immediate leave until a decision could be made on his case by UNHCR Headquarters. On 18 November 1992, the Acting Director, SWANAME, submitted his report to the Director, Division of Human Resources Management (DHRM).

On 26 November 1992, the Director, DHRM, informed the Applicant that the investigation raised "the most serious concerns over your conduct as an international civil servant, as a Senior Protection Officer, as well as Acting Head of the UNHCR Office in Amman". The Director, DHRM, sent the Applicant correspondence relating to the allegations, and requested his comments, pending which the Applicant was put on special leave with full pay. The Applicant submitted his comments to the Director, DHRM, on 4 and 16 December 1992.

On 29 March 1993, the Director, DHRM, recommended to the Director, Personnel Department, that the Applicant's case be submitted to a joint disciplinary committee in accordance with staff rule 110.4(b). Attached to this memorandum were documents concerning a series of events in 1985 and 1986, involving the

Applicant's conduct, unrelated to his work with UNHCR, which had caused embarrassment to the Organization.

On 1 July 1993, the Director, DHRM, informed the Applicant of the decision to refer his case to the Geneva Joint Disciplinary Committee (JDC). The Applicant was charged with two counts of misconduct:

(1) The evaluation by the Applicant of the refugee status of two Iraqi asylum seekers and his personal relationship with Mr. X;

(2) Theft of US$5,000 given to him by the Regional Resettlement Officer for safe-keeping.

On 12 August 1993, the Applicant forwarded his comments to the Secretary of the JDC. On 4 October 1993, the Director, DHRM, submitted to the Secretary of the JDC additional information related to the charges against the Applicant.

On 1 December 1993, the newly appointed Director of DHRM submitted to the Secretary of the JDC additional information concerning the Applicant's evaluations of the two Iraqi asylum seekers. The JDC adopted its report on 12 August 1994. Its findings and recommendations read, in part, as follows:

> "132. ... the Committee held that the staff member had not acted in the manner required by his function and status within the Organization. Indeed, a staff member's private life and relationships should not interfere with [his] professional life to the extent of creating repercussions on his professional environment and casting doubts on the functioning and the integrity of the United Nations. The Committee's concern on this matter was enhanced by the staff member's previous problems in another duty station which should have incited him to be more prudent in his private life so as not to put the Organization in difficult situations. The Committee considered this obligation was especially important in the present case, taking into account the seniority of the staff member and the sensitive field area in which he was operating.
>
> 133. In view of these ... findings, the Committee carefully studied all the facts of the case and again had to conclude that there was no factual element or evidence that

there had been an act of misconduct. The staff member had certainly been negligent as to the choice of his acquaintances but there was no proof that [the Applicant] was conscious of acting against the interest of the Organization. The Committee found that the staff member, who was certainly qualified in technical terms for his functions, did not meet other standards of moral and adequate judgment that were required by his functions.

134. In relation to the above finding, the Committee found it necessary to underline that the Organization had a certain part of responsibility as far as the posting of [the Applicant] was concerned. The Committee noted that the Administration had in the past faced certain problems with the staff member and was not entirely satisfied with him. Therefore, the question was raised as to the rationale for renewing the staff member's contract and posting him in a sensitive field with substantial responsibilities. In this respect, the Committee found that if the staff member were to continue working for the United Nations he should be closely supervised.

Theft of US$5,000 in the Branch Office

135. On this matter, the Committee found little to examine. Indeed, the only witness to this incident, Mr. [W], was incapable of corroborating Mr. ..'s contention that he did give money to [the Applicant], therefore there was no way to prove that the alleged incident actually took place.

V. Recommendation

136. There existed strong presumptions that the staff member had not respected the standard of conduct of the Organization; there was however no proof that the staff member had deliberately acted against the interest of the United Nations or committed acts of misconduct, and yet again there was no evidence that he was totally innocent. The Committee reiterates its opinion that the staff member did not meet the required standards of conduct prescribed by the 'Reports on Standards of Conduct in the International Civil Service' in fulfilling his functions and that he acted in an irresponsible and negligent manner. However, the Committee failed to obtain information on the level of importance attached to this type of misconduct in the United Nations Organization as a whole and on the nature of the disciplinary measure normally applied in such cases. The Committee, being concerned that the administration of justice should be coherent throughout the Organization and having the view that

disciplinary measures should be applied independently from the duty station and from the personal judgement of members of the Panel, transmits its report to Headquarters for the determination of the disciplinary measure in accordance with the jurisprudence pertaining to the violation of the 'Report on Standards of Conduct in the International Civil Service' and acts or behaviour that would discredit the United Nations."

On 26 October 1994, the Under-Secretary-General for Administration for Management transmitted to the Applicant a copy of the JDC report and informed him as follows:

"... The Secretary-General has examined your case in the light of the [Joint Disciplinary] Committee's report. The Committee found that you did not meet the moral standards nor exercised adequate judgement required by your functions at UNHCR. Furthermore the Committee has found that you had been negligent and irresponsible in your conduct in that you should have been more prudent in your relationship with Mr. [X] (sic) and in your private life where some of your behaviour became public and cast suspicion on your integrity and on the public image of the Organization.

It is a basic requirement of officers employed at UNHCR, dealing in refugee cases which must subsequently be submitted to Member States, that they command the highest degree of integrity, moral standing and transparency in their public and private conduct.

The Secretary-General has carefully considered the report of the Committee and accepted the conclusion of the Committee that you acted in 'an irresponsible and negligent manner' and that your conduct did not meet the standards required of an international official. He has furthermore concluded that your actions and behaviour constitute misconduct. He has therefore decided that you are to be dismissed from the service of the Organization for misconduct, with 30 days' compensation in lieu of notice in accordance with rule 110.3(vii) of the Staff Rules and Regulations. Your separation shall be effective at the close of business on the day on which you receive this notification.

..."

On 9 August 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JDC made its recommendation based on factual errors and did not observe procedural requirements, thereby denying the Applicant due process.

2. Contrary to the basic principles of law, the burden of proof was shifted to the Applicant.

3. The Applicant was exonerated by senior officials and thus the administrative decision to dismiss him was unjustified.

Whereas the Respondent's principal contentions are:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes misconduct warranting dismissal. The Secretary-General's decision to dismiss the Applicant was a valid exercise of that discretionary authority, and was not vitiated by a mistake of fact, by lack of due process or by prejudice or any other extraneous factors.

2. The Applicant failed to meet the standard of conduct required of international civil servants.

3. The Applicant's due process rights were fully respected.

The Tribunal, having deliberated from 28 October to 25 November 1997, now pronounces the following judgement:

I. The Applicant requests the rescission of a decision by the Secretary-General summarily dismissing him for misconduct. Staff regulation 10.2 reads:

> "The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. He may summarily dismiss a member of the staff for serious misconduct."

This regulation is further elaborated in Chapter X of the Staff Rules.

II. The provisions referred to above do not allow the Secretary-General unlimited and uninhibited discretion to take disciplinary measures in an arbitrary manner and thus do away with the protection that all staff members desire and deserve. The Tribunal has established its firm and consistent jurisprudence that, in the exercise of his discretion in disciplinary matters, the Secretary-General's action must be free of prejudice, extraneous factors, important procedural irregularities or significant mistakes of fact.

III. The Tribunal notes that, although in the proceedings before the Joint Disciplinary Committee (JDC) no firm conclusion was reached on the two charges specifically brought against the Applicant, the JDC, after a full examination of all the facts that were revealed about the activities, associations, and the attitude of the Applicant, concluded that "the staff member did not meet the required standards of conduct." The Tribunal considers that the JDC examined with thoroughness and in detail all the allegations about or against the Applicant before coming to its conclusions. Further, it properly complied with the procedures for the examination of evidence applicable in administrative matters. In addition, the Tribunal has not found any evidence of the existence of any flaws

that might call into question the proper exercise of discretion by the Respondent.

IV. The Tribunal, after examining the evidence before it, concluded that the Applicant was clearly acting and behaving in a way which was not only against the interests of the United Nations, but was at times against the instructions and wishes of his senior officer (e.g., regarding the Applicant's association with other members of the public).

V. The Tribunal is aware that in many of his activities the Applicant might not have been fully conscious of the harm he was doing to his reputation and the opprobrium he was bringing to the United Nations. However, such lack of awareness cannot exonerate him from the consequences of his actions.

VI. The Applicant has raised the question of due process. The Respondent claims that due process was observed and that the Applicant was given every opportunity to present his point of view. The Tribunal holds that the JDC did not vitiate the principles of due process or fail to justify its main conclusion about the Applicant's unsuitability to continue in the service of the United Nations.

However, the JDC did not make any firm recommendation on the action to be taken against the Applicant. This was due to its desire that the action in this case should be consistent with the action taken in similar cases. It therefore left it to the Respondent to decide what should be done in this case. The Tribunal does not wish to comment on this aspect of the JDC's conclusion. The Tribunal notes that, contrary to the established practice, the JDC did not recommend an appropriate sanction, as it should have done. It left the final decision to the Secretary-General without the benefit of a recommendation. Nevertheless, the

Tribunal is of the view that the Secretary-General exercised his discretion properly, in this case.

Accordingly, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/850
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 850

Case No. 957: PATEL

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Meena Patel, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 December 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 18 December 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"[To order the production of certain documents]; and

B. To order the rescission of the Secretary-General's decision dated 10 June 1996 separating the Applicant for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3(a), with effect [from] 21 June 1996; and

C. To adjudge and declare that the Applicant has not been guilty of misconduct, but, at the most, of an error committed in good faith, at a time of severe stress due to compelling personal, professional and family circumstances; and

D. To order her retroactive reinstatement in the United Nations together with the restoration of her permanent appointment; or

E. Should the Secretary-General decide, in the interest of the UN, in accordance with article 9 of the Statute of the Tribunal, that the Applicant be compensated and not reinstated, to order payment to the Applicant of a

compensation equivalent to five years' net base salary at [the] D.1 grade, step IV for assignment in Bangkok, including restoration of pension and health insurance rights; ...

F. To order payment of $100,000 (one hundred thousand US dollars) as compensation for the material and professional injury sustained and its moral and financial consequences on the Applicant's professional career and personal life; ...

G. To order payment of three months' net base salary at [the] D.1 grade in Bangkok as compensation for the failure to afford the Applicant due process detailed below; and

H. To order reimbursement of all legal costs incurred in relation to the present complaint, and

I. To order payment of interest at 6% to [the] Applicant on all sums hereunder from 1 June 1996."

Whereas the Respondent filed his answer on 13 May 1997;

Whereas, on 4 June 1997, the Applicant filed written observations;

Whereas, on 21 October and 2 November 1997, the Applicant filed additional comments with the Tribunal;

Whereas, on 7 November 1997, the Tribunal requested the Respondent to provide it with additional information, which he did, on 11 November 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Economic and Social Commission for Western Asia (ESCWA) on 7 July 1977, as a Transnational Corporations Affairs Officer, at the P-3, step I level, in Beirut, Lebanon, on a three month, fixed-term appointment, which was successively extended. On 1 April 1981, the Applicant was promoted to the P-4 level. On 1 July 1982, she was reassigned to ESCWA, Baghdad, Iraq. On 1 November 1982, she was given a probationary appointment. On 17 June 1983, she was transferred to the Economic and Social Commission for Asia and the Pacific (ESCAP) in Bangkok, Thailand, as an Economic Affairs Officer in ESCAP's

Development Planning Division. On 1 August 1983, the Applicant was given a permanent appointment. On 1 February 1988, she was given the functional title of Social Affairs Officer in ESCAP's Social Development Division. On 1 August 1988, the Applicant was promoted to the P-5 level. On 17 January 1994, she was appointed Officer-in-Charge of the Rural and Urban Development Division of ESCAP. On 1 November 1994, the Applicant was promoted to the D-1 level. On 21 June 1996, the Applicant was separated from service for misconduct.

On 30 September 1994, the Applicant submitted a Status Report and Request for Payment of Dependency Benefits form for the years 1992 and 1993, together with a "TO WHOM IT MAY CONCERN STATEMENT", dated 28 April 1994, from the Asian Institute of Technology (AIT), indicating that her husband had gross earnings of Baht 707,610 for the calendar year 1993.

On 11 November 1994, the Chief of the ESCAP Personnel Services Section acknowledged receipt of the form and advised the Applicant that her husband's earnings for 1993 exceeded the ceiling established for the payment of a dependency allowance. He explained that recovery of the amounts previously paid to the Applicant as a dependency allowance would start for the year 1993. He further asked the Applicant to supply information on her husband's earnings for 1992.

On 10 January 1995, the Chief, Personnel Services Section, wrote to the Applicant, reiterating the request for a statement of her husband's earnings for 1992. In a reply delivered to the Personnel Services Section on 12 January 1995, the Applicant submitted a statement from the AIT, dated 8 November 1994, in response to that request.

On 23 January 1995, the Chief of the ESCAP Personnel Section asked the Applicant to "clarify and confirm" the figures in that statement. In a response dated 27 January 1995, the Applicant sent a routing slip to the Chief, Personnel Services Section, stating, inter alia, "This is to confirm that the gross earnings of [the Applicant's husband] is Baht 601,576.00 from January to December

reflected in a memorandum dated 28 February 1992 from the Director of DIEC to the Executive Officer.

In a handwritten note dated 26 May 1992, to the Chief of Staff of the Under-Secretary-General of the Department of Economic and Social Development (DESD), the Director, DIEC, wrote that he had "been able to secure all records" pertaining to the Applicant. He added that: "As you can see[,] she has received an unfair deal first on the question of the private arrangement over ... her post and now in regard to her status. I should be most grateful if you could urgently assist [her] in resolving the situation". In another handwritten note of the same date to the Director of Personnel, the Director, DIEC, wrote: "I think [the Applicant's] case merits urgent and sympathetic consideration. She has received an unfair deal both in regard to her post in DIEC and now with regard to her status. I discussed this with ... the Chief of Staff of [the Under-Secretary-General of DESD], who promised to look into the matter. I have sent him the attached papers. I should be grateful if you could assist in redressing this anomalous situation".

Not having been included in the 1992 Senior Officer (P-5) Promotion Register, on 29 July 1993, the Applicant instituted a recourse procedure in accordance with information circular ST/IC/1993/35, requesting the APB to review her case for promotion from the P-4 to the P-5 level.

On 8 September 1993, the Applicant wrote to the Executive Officer, Department for Policy Coordination and Sustainable Development (DPCSD), transmitting her 29 July 1993 recourse letter and requesting "that [her] P-5 post be restored and action should be initiated to ensure that [she] be placed against post #UNA-1110-E-P-5-002".

On 29 October 1993, the Executive Officer, DPCSD, wrote to the Applicant, stating that she had been assigned to DPCSD with effect from 1 April 1993, against a P-4 level post and that "[t]he

points raised in [her] memorandum predate [her] DPCSD assignment and [were] not within [that] Department's purview".

On 4 November 1993, the Applicant wrote to the Secretary-General, requesting administrative review of the decision not to place her against a P-5 post in her department (DPCSD).

In a letter dated 17 November 1993, the Chairperson of the APB advised the Applicant that "notwithstanding the additional information presented in [her] communication, the Board's re-examination of [her] case did not reveal that there were sufficient grounds to amend its previous decision".

On 15 February 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against "the administrative decision not the place [her] against a P-5 post in [her] department." The JAB adopted its report on 25 April 1995. Its considerations and recommendations read, in part, as follows:

> "Considerations
>
> A. Receivability
>
> ...
>
> 21. The Panel observed that the subject appeal involves two aspects, namely, (a) the Organization's failure to place the Appellant against a P-5 post and (b) the Organization's failure to include the Appellant in the 1992 P-5 Promotion Register.
>
> 22. With respect to the Appellant's claim regarding the Organization's failure to place her against a P-5 post, the Panel observed that the Appellant had been placed against a P-5 post in 1987, the same year that she had been promoted to the P-4 level. In July 1990, however, the Appellant had been removed from this post and placed against a P-4 post, a change which the Appellant acknowledged that she became aware of in 1991. The Panel further observed that the Appellant has since held only P-4 posts. Noting the above requirement that an appeal must be directed against an administrative decision, the Panel found that, other than the administrative decision to remove the Appellant from the P-5 post and place her against a P-4 post in 1990, against which an appeal would

17. Taken along with the certificate already submitted for 1993 earnings (...), the Committee was not convinced of the need for the staff member to have called anyone on receipt of the 1992 certificate. The error on the certificate regarding the contract expiry date was an egregious one, contradicted within the form itself, and not material to the determination of the dependency limits. Indeed, the certificate finally utilized to determine dependency status still contained the error.

18. The Committee took the view that the manner in which the certificate had been altered was significant. Although 'blatant' in a certain sense, an attempt had been made to make it look 'official', and the Committee gathered that if PSS [Personnel Services Section] had been less vigilant, it might have passed muster. The Committee agreed with the staff member's contention that, in retrospect, it would have been better to have obtained a new certificate altogether. It noted, however, that to have done so, if there was intention to defraud, would not have served the staff member's purpose.

19. The staff member and her counsel averred that the staff member's repeated confirmation of the lower incorrect figure proved that there had been no male fide intention. In fact, the Committee felt that PSS' two requests for clarification gave the staff member the opportunity to rethink the situation and rectify it - but she chose not to. The Committee realized that once the staff member's attention had been drawn to the falsified document, she was in a difficult position; she had either to maintain her position, which she did, or admit to having knowingly submitted a document with changes to what proved to be the correct figure.

20. All in all, the Committee felt that the onus of proof that the false certification was not done with intent to defraud, rested with the staff member. The Committee was not convinced, taking the above points into account, that the staff member had demonstrated a lack of male fide intention. In a certain sense, the staff member's actions were consistent with an intention to defraud: failure to submit the required information in the first instance, reported questioning of an apparently valid certificate, carefully changing the certificate in a manner that, had it passed unnoticed, would have brought her material gain, persisting in that contention when queried, and providing inconsistent evidence on the crucial matter of the identity of the AIT employee to whom she spoke.

21. The Committee therefore concluded that the charges brought against the staff member, namely,

a) false certification;
b) forgery;
c) attempted fraud; and
d) misrepresentation

were substantiated. The facts as established would constitute a violation of her obligations under staff regulation 1.4, which requires staff members to conduct themselves at all times in a manner befitting their status as international civil servants, and a violation of the standards of integrity expected of all international civil servants.

V. Recommendations

22 Having considered the case most carefully, and given the nature of the offence, the Committee would have recommended demotion as an appropriate disciplinary measure in the absence of any mitigating circumstances. However, based on information which had been provided in the staff member's submissions, the Committee recognized that there were mitigating circumstances in the present case. The Committee was deeply sympathetic to the staff member's situation although it was not able to determine the exact extent to which these circumstances, in particular their time frame in relation to the incidents under investigation, might have affected her judgement and actions (nor did it feel it appropriate to probe further into those circumstances). In view of the mitigating circumstances and the staff member's 18 years of satisfactory service, the Committee recommends that the Secretary-General take the following disciplinary measures against the staff member:

a) letter of censure to be placed in the staff member's official file;

b) loss of steps within grade - reversion to step I;

c) suspension without pay for three months.

The Committee also recommends that the staff member's certifying officer functions be withdrawn for a period of two years."

The Secretary-General has also taken note of the comments of the Board in paragraph 31 of its report and confirms that you will receive full and fair consideration, along with other applicants, for promotion to a vacant P-5 post for which you apply and are found to be qualified, and with due regard also to the applicability of the special measures to improve the status of women in the Secretariat set forth in administrative instruction ST/AI/382".

On 19 August 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given due consideration for a promotion to the P-5 level and, hence, the recommendation of the APB not to include her name in the 1992 Promotion Register cannot stand.

2. By not promoting her to the P-5 level, the Organization violated the promises made to the Applicant by senior managers on which she had relied to her detriment.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal against the administrative decision to remove her from a P-5 post and place her against a P-4 post is time-barred and, if not time-barred, did not violate her rights.

2. The Applicant failed to identify another administrative decision, besides that of July 1990, which may be a subject of her appeal.

3. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-inclusion in the Promotion Register.

4. The Administration did not make a binding commitment to promote the Applicant.

The Tribunal, having deliberated from 28 October to 25 November 1997, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General to accept the recommendation of the Joint Appeals Board (JAB) that the Applicant was not wrongfully denied promotion to the P-5 level. The Applicant argues that, contrary to the views expressed by the JAB, the Administration had made a binding commitment to promote her to the P-5 level. Furthermore, she contends that her right to due consideration to fill P-5 post number UNA-11110-E-P-5-002 was violated when the post was filled by an external candidate. Consequently, the Applicant asks the Tribunal to order that she be fully and fairly considered for promotion to the P-5 level and that she be compensated for the personal injury and stress suffered as a result of the unfair treatment she received from the Administration.

II. At the outset, the Tribunal must deal with the issue of a time-bar of the Applicant's claim that her non-placement in a P-5 post violated her rights. The Tribunal notes that the Applicant had been placed in the P-5 post in 1987, the year she had been promoted to the P-4 level. In July 1990, the Applicant was removed from this post and placed in a P-4 level post. It appears that the Applicant became aware of this change of placement only in 1991. At that time, the Applicant could have availed herself of the recourse procedures established by staff rule 111.2. This rule allows an appeal from an administrative decision, "within two months from the date the staff member received notification of the decision in writing". The decision to remove the Applicant from a P-5 post and to place her in a P-4 post was taken at least one and a half years before the date of her appeal. The Tribunal therefore finds that

applicable in cases of misconduct" which the Administration had furnished to the JDC. The Respondent also admits that when the Chief, Personnel Services Section, provided additional clarification on the case, neither the Applicant nor her counsel were present and that two witnesses gave testimony in the presence of each other. The Tribunal notes that the charge of misconduct due to fraud against the Applicant is severe and therefore the Administration must be scrupulous in its respect for the requirements of due process. Having reviewed the case, the Tribunal takes note of the Respondent's admission that certain procedural errors were committed.

III. Paragraph 17 of administrative instruction ST/AI/371 dated 2 August 1991, states:

> "If the Committee [the JDC] decides to hear oral testimony, both parties and counsel should be invited to be present, and no witnesses should be present during the testimony of other witnesses."

The JDC did not respect this provision. The Tribunal finds that although the JDC committed procedural errors, these errors were technical in nature and did not affect the substance of the Applicant's case so as to result in a miscarriage of justice (Judgement No. 583, Djimbaye (1992)). Nonetheless, the Tribunal wishes to emphasize that especially in a difficult case such as this one, the Administration must take care to ensure that all procedural requirements are scrupulously respected.

IV. On the substance of her claim, the Applicant submits that the Administration's charges against her had not been proven beyond a doubt and that they should therefore be dismissed. The Tribunal rejects this argument. Under the Staff Regulations and Rules, disciplinary proceedings are administrative proceedings regulated by

the internal law of the Organization. Once a prima facie case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question (Judgements No. 484, Omosola (1990) and No. 592, Dey (1991)).

V. The Tribunal notes that it is incumbent upon the staff member who obtains allowances or benefits from the Administration, on the basis of his or her certification, to ensure that proper information is supplied. The Applicant submitted a certificate for dependency benefits on which she indicated that "I certify that the information provided in this form, as well as the supporting evidence submitted with it, is true and complete to the best of my knowledge and belief." Since the certification was incorrect, the Applicant had the onus of proof to convince the Secretary-General that, in submitting the certificate, she had not acted contrary to the highest standards of integrity, as mandated by the United Nations Charter. In order for the Applicant to prevail, it is not sufficient for her to claim good faith based on trusting another's representation (Cf. Judgement No. 424, Ying (1988)). The Applicant has produced evidence showing that her conduct was, or may have been, attributed to the dire personal circumstances in which she found herself at the time of her misconduct. The JDC's consideration of these facts led it to find that they constituted mitigating circumstances. Consequently, the JDC recommended that the Applicant be suspended without pay for three months, that she lose all steps within her grade above step I, and that a letter of censure be placed in her personnel file.

VI. It is within the Secretary-General's discretion, however, to determine whether a staff member has met the standards of conduct required by the Charter and the Staff Regulations and Rules. (Cf. Judgements No. 424, Ying (1988); No. 425, Bruzual (1988 and No. 479, Caine (1990)). It is clear that the Secretary-General, in

his determination, must act without prejudice or other extraneous considerations and with respect for the requirements of due process (Cf. Judgements No. 436, Wiedl (1988) and No. 641, Farid (1994)). Taking into account the technical procedural errors previously discussed, the Tribunal considers that, however harsh the result may be for the Applicant, the Secretary-General was within his discretionary authority in determining that the Applicant's alteration of the AIT certificate constituted misconduct, which should result in the sanction applied.

VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary